UNITED STATES COURT OF FEDERAL CLAIMS

MARVIN M. BRANDT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket No. 09-265L
	)	
UNITED STATES,	)	
	)	
Defendant.	)	

Tuesday,
November 22, 2011

Live Tape

(The following transcript was transcribed from a digital recording provided by the United States Court of Federal Claims to Heritage Reporting Corporation on December 27, 2011.)

BEFORE: EMILY C. HEWITT
CHIEF JUDGE

APPEARANCES:

On Behalf of Plaintiffs:

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P R O C E E D I N G S

(2:59 p.m.)

MR. LECHNER: Good afternoon, Your Honor. This is Steven Lechner for the Plaintiffs, Marvin M. Brandt and Marvin M. Brandt Revocable Trust.

THE COURT: Thank you, sir.

MR. DOAN: Good afternoon, Your Honor. Joshua Doan for the United States from the Department of Justice, and with me at counsel table is Kate Schneider from the United States Department of Agriculture.

THE COURT: Good afternoon to all. Counsel?

MR. DOAN: Thank you. So again, for purposes of the record, this is Joshua Doan for the United States.

THE COURT: You passed.

MR. DOAN: Thank you, Your Honor. May it please the Court. We filed the pertinent motion to dismiss that we're here to discuss today in light of the Supreme Court's recent interpretation of 28 U.S.C. § 1500 in the Tohono O'odham Nation case, and in that case the Court held that for purposes of § 1500 two suits are for or in respect to the same claim precluding jurisdiction in the CFC if they are based on substantially the same operative facts regardless

of the relief sought in each suit.

The Brandt CFC lawsuit must be dismissed under § 1500 and the Tohono O'odham decision for two basic reasons. First, the Brandts' District Court counterclaim was still pending when the Brandts filed their takings suit in this Court and, second, even if the Brandts had not filed a takings counterclaim in the District Court, their quiet title counterclaim in the District Court is based upon substantially the same operative facts as their takings suit in this Court, thus triggering the bar of § 1500.

Now, to go through each of those in a little more detail, in the District Court case, Your Honor, the Brandts included a counterclaim for just compensation both in their August 8, 2006, answer and counterclaims and in their October 1, 2007, first amended answer and counterclaims. The Brandts then brought a takings counterclaim seeking just compensation in this Court on April 28, 2009.

Under the decisions by the Court of Federal Claims in Jachetta v. United States -- I hope I'm pronouncing it correctly, but for purposes of the record, that's J-A-C-H-E-T-T-A -- 94 Fed. Cl. 277 from 2010, and several other cases, a claim is pending in another Court for purposes of § 1500 until the time to

appeal from the dismissal of the claim in the other Court has expired.

THE COURT: That's one of the places where there's authority on both sides, as you know.

MR. DOAN: Yes.

THE COURT: And I'll be asking the same question of Plaintiff. But can you cite any sort of practical or common sense reasons why one or another of these positions is favored?

MR. DOAN: Well, I think that under a plain reading of § 1500 there's no breakdown and there's no limitation as to what pending means or should not mean in the plain text of § 1500. It's just if it's pending, so the timing of the filing of an appeal should not matter under the plain meaning of the statute.

The other, I don't know if it's practical, but the Supreme Court's instruction in Tohono O'odham Nation on the purposes of § 1500 is to avoid subjecting the United States to the burdens of redundant litigation in multiple Courts at the same time, and so the United States is forced to bear that burden here because the Plaintiffs filed suit first in the -- or Plaintiffs filed a counterclaim rather in the District Court.

They filed a counterclaim both for takings and for quiet title, and then they filed their takings suit in this Court before the time had expired to appeal the dismissal of their takings counterclaim in the District Court. To the best of my knowledge, they did not actually appeal the dismissal of their takings counterclaim. They did, however, appeal the dismissal of their quiet title counterclaim, and that goes to my second point.

But as to the first point, their takings counterclaim, they were still within the 60 days in which they could appeal the dismissal of their takings counterclaim under Federal Rule of Appellate Procedure 4(a)(1)(B) when they brought suit in this Court. So under the Jachetta decision, which has been followed by other decisions of the Court of Federal Claims in more recent years, their takings counterclaim is still technically pending when they filed suit here.

THE COURT: One of the sensitivities in the Tohono aftermath is the possibility that a plaintiff with a complaint against the United States is going to be timed out under the statute of limitations.

Could a plaintiff who's in the situation of the counterclaimed Plaintiffs here, the Plaintiffs in this case but counterclaimed elsewhere, is it possible

under the rules for them to file some paperwork with the Appeals Court that stated that they would not appeal that would then be binding on them? Is there any way to rescue that 60 days?

MR. DOAN: So I'm trying to make sure I understand your question correctly. If they wanted to waive their right to appeal you're asking?

THE COURT: Exactly.

MR. DOAN: I guess they could file something with the Court in which the other suit had been pending. I think they could also plead in their complaint in this Court, for example, that there was a prior case here in the United States District Court for the District of Wyoming. Although the Plaintiffs had the right to appeal from the adverse decision, they renounced their right to do so.

I don't see why they couldn't say something in their filing actually in this Court that they were renouncing their right because it's this Court that has to determine whether or not § 1500 is available.

THE COURT: I'm not aware of any authority on this. Are you?

MR. DOAN: I can't say that I am, Your Honor.

THE COURT: Thank you.

MR. DOAN: It's also important to remember that here the six-year time bar exception, 2501, is not an issue. The Brandts allege that their takings claim accrued when the District Court entered its judgment on March I believe 2, 2009, so we're still years away. We were years away when they brought suit in this Court and we're still years away now, so I don't think that there's any real risk here of a bar.

THE COURT: Maybe not to them, but the policies are certainly. These various policies are at issue here.

MR. DOAN: So that's the takings counterclaim. As to the quiet title counterclaim, the quiet title counterclaim and the takings claim in this Court arise from the same set of operative facts.

In both cases we're talking about the same railroad right-of-way on which the same railroad stopped offering rail service traversing the same property owned by the Brandts and that was acquired, the same property that was acquired under the same patent from the United States. So we're really talking about the same factual circumstances in both cases.

It's a threshold issue in any takings claim whether the plaintiff owned the property interest

allegedly taken on the date of the alleged taking, and that's exactly the issue that was in dispute in the quiet title case on their quiet title counterclaim, so we'd submit that even if they had not filed a takings claim in the District Court, strictly by filing a quiet title counterclaim based on again the same property, the same railroad with the same railroad offering service and the same patent having granted the property interest to the Brandts and pointing to the same patent for purposes of arguing that they own the reversionary interest rather than the United States, we're talking about the same set of operative facts here.

THE COURT: So no matter which counterclaim we compare.

MR. DOAN: That's right. And they did. In the District Court they incorporated by reference the allegations regarding their quiet title counterclaim into their takings counterclaim. The takings counterclaim was the third counterclaim in the District Court and they incorporated all the preceding paragraphs, so all the allegations related to the takings counterclaim or, I'm sorry, all the allegations related to the quiet title counterclaim were incorporated into the takings counterclaim.

So just in summary, again to allow the Brandts to proceed here while they also chose to proceed on appeal to the United States Court of Appeals for the Tenth Circuit while their Tenth Circuit appeal remains to be decided violates the purposes of § 1500, as made clear by the Supreme Court in Tohono O'odham, which is to avoid subjecting the United States to redundant burdens or to the burdens of redundant litigation rather. So unless the Court has further questions?

THE COURT: Well, I want to just chat with you a little bit --

MR. DOAN: Sure.

THE COURT: -- about the argument that the United States is making that the application of 1500 does not lead to absurd, inequitable or unconstitutional results. And this is not the most difficult case for the reasons that you mentioned in terms of timing.

MR. DOAN: Right.

THE COURT: But the truth is, and Plaintiffs certainly say, that under FRCP 13(a) or RCFC 13(a) both Courts would require them to raise their compulsory counterclaims in that forum in a situation or risk waiver and so they really don't have the same

possibility to elect forum that a plaintiff normally would have.

MR. DOAN: Well, I mean, I don't understand why they can't just defend the quiet title claim brought by the United States and then they could have filed -- even if they had lost, if they had strictly defended and not filed a counterclaim, they could have filed their case in this Court even while pursuing their appeal. They could have also just waited, as Your Honor suggested. They could have just waited until their appeal had been decided before they filed suit in this Court.

I mean, this goes back to the motion that the United States filed a couple years ago, but maybe the case is if the Tenth Circuit agrees with the Plaintiff they won't even have a takings claim in this Court because it was predicated upon the District Court's judgment. So, if the District Court's judgment is reversed, then there was never any reason for us to have been here, so they could have waited for the decision there.

They could have waited until they had exhausted all their appeals from the adverse judgment there before they came into this Court. They didn't have to bring their takings counterclaim, I don't

believe, in the District Court. They may have had to file a quiet title counterclaim if they were going to file one, but they did not have to file a takings counterclaim.

THE COURT: Because of the overlapping jurisdiction?

MR. DOAN: Well, because they're seeking more than $10,000 and because the District Court is not a Court of competent jurisdiction to hear a takings counterclaim in that amount.

THE COURT: Thank you.

MR. DOAN: Thank you, Your Honor.

MR. LECHNER: May it please the Court. My name is Steve Lechner, and I represent Plaintiffs Marvin M. Brandt and Marvin M. Brandt Revocable Trust. I want to thank Your Honor for scheduling these arguments.

Before I get into my spiel so to speak, I want to address some of the Court's questions regarding the statute of limitations. The government kind of says that we don't have a statute of limitations under our theory of the case, but they don't agree with our theory of the case of when the taking occurred, and therefore it's possible that they could raise a statute of limitations based on some

other reason as they've done several times in other Rails to Trails cases.

So they haven't stipulated that our take occurred or statute of limitations began running on March 2, 2009, so they still have other available arguments regarding the running of the statute of limitations.

THE COURT: I don't know if I've had those cases, so tell me what the scenario would be that would turn out to be a late hit from your point of view.

MR. LECHNER: Well, in the run of the mill Rails to Trails case, and it's under a different section than what we're faced with here, but the question is whether if the railroad issues a notice of intent to abandon and the Surface Transportation Board issues a NITU, there's some cases that suggest that starts the running of the statement of limitations even though the railroad has not been formally abandoned, nor has the railroad been turned over to a rail provider.

So there's other litigation going on about when does the statute of limitations really run, so I am certainly worried about other arguments the government could raise regarding when the statute of

limitations for a taking claim may have started.

With respect to us defending the United States' case, if we hadn't filed a counterclaim, a Quiet Title Act counterclaim --

THE COURT: This is in Wyoming?

MR. LECHNER: Right. In Wyoming. If we hadn't filed, even though we think it's compulsory and all that good stuff, but if we hadn't filed and we had merely defended against the United States' assertion of title and we were successful, we wouldn't get title.

We would have to bring another Quiet Title Act case to get title quieted in our favor, so that would have caused redundant litigation there, and it will certainly go to waste a huge amount of judicial resources to bring another quiet title to actually get the title vested in us because if the United States loses title, the issue is still up in the air who owns it, so that's one of the reasons why we filed the quiet title counterclaim.

I'd like to address first the takings counterclaim, and I submit that that takings counterclaim that was filed in the Wyoming District Court was irrelevant for purposes of § 1500. It was never litigated.

THE COURT: How come, as I say?

MR. LECHNER: Oh, I'm sorry. I didn't hear you. Okay. It was never litigated. The takings counterclaim was bifurcated and stayed by agreement of the parties, and as the United States admits -- admitted -- the takings counterclaim was clearly premature when it was filed because it was conditioned on a possible future ruling by the District Court.

The United States also admitted, and I think they just admitted it here, that the District Court lacked jurisdiction because the Brandts sought more than $10,000. As a result, the District Court granted the United States' motion to dismiss the taking claims in the Wyoming case, and we submit that a claim for which a Court has no jurisdiction over cannot be a claim pending for purposes of § 1500.

And our support for that is Vero Technical Support, which I think the government cited with respect to the question of pending, which we disagree with, but that's at 94 Fed. Cl. 78, Judge Horn's decision, and also Loveladies Harbor, 27 F.3d 1545.

Even though Loveladies has been reversed on other grounds by Tohono, it still stands for the proposition that if a claim is pending in another Court, but that Court does not have jurisdiction over

that claim, that claim is not held against the Court of Federal Claims litigant plaintiff.

THE COURT: Is it your view that the subsequent developments that have affected Loveladies don't touch that aspect of it?

MR. LECHNER: I think, well, Vero Technical came down -- well, no. I don't think they touched that part of the ruling, and I think -- oh, I can't remember. I think Nez Perce recently talked about it also, but I'm not sure, so don't quote me on that, but I think that proposition still stands.

THE COURT: Point me to that argument in briefing if it's in briefing.

MR. LECHNER: Pardon me?

THE COURT: Could you point me to this argument in briefing that we're now discussing?

MR. LECHNER: Well, we didn't brief it because, based on the government's motion to dismiss, it appeared like they were only going after the quiet title counterclaim. It was not apparent to me that they were going after a takings counterclaim until their reply brief was filed with respect to this motion to dismiss, so I didn't have the opportunity to brief it. I'd be glad to brief it if the Court would like after the hearing.

Going on to the merits or going on to the motion to dismiss, this Court should deny the United States' motion to dismiss for three reasons. First, the Brandts didn't have a claim pending for purposes of § 1500 when they filed this case in this Court, and the Brandts' quiet title counterclaim and the taking claims are not based upon the same operative facts. And finally, the purpose of § 1500 would not be violated by denying the government's motion.

With respect to pending, as the Court knows, there's cases going on both sides of this, but we submit that Judge Wolski had it right in Young v. United States, 60 Fed. Cl. 418, where he looked at the plain meaning of the word pending as to mean not yet decided, remaining undecided, awaiting decision.

And then based on the plain meaning of the word pending, he ruled that the Court of Federal Claims is not precluded from exercising jurisdiction over a claim against the United States that had been dismissed by a District Court but not yet appealed. And he also cited a line of cases like Boston Five Cents Savings Bank, 864 F.2d 137, for this proposition and several other Court of Federal Claims cases. Young was also followed by Judge Smith in Fire-Trol Holdings, LLC v. United States, 65 Fed. Cl. 32.

And we submit that the cases relied on by the United States are not persuasive or can be distinguished. The United States here mentioned, and I probably can't pronounce it either, Jachetta v. United States.

THE COURT: It starts with J. We've got it.

MR. LECHNER: Yes. Well, in that case the plaintiff filed both cases. It wasn't like this case where the Brandts were dragged into Wyoming District Court by the United States, and in that case the plaintiff's motion to amend the District Court judgment was still pending at the time the plaintiff filed the suit, so clearly that case was still pending as here, which we had a final judgment before we filed our complaint in this Court.

Vero Technical, again, the plaintiffs filed both cases and simply followed that case of Judge Horn in Jachetta, but that case was also unique because there the plaintiff took the I submit strange position that § 1500 would operate to divest the Court of Federal Claims of jurisdiction once the plaintiff filed its notice of appeal in a District Court action. I don't think that position is --

THE COURT: So there's a gap period?

MR. LECHNER: Yes. He conceded that once he

did file his planned appeal then jurisdiction in this Court would vanish, which I don't think is right because it's sort of inconsistent with the order of filing rule, which is as long as the case is filed here even minutes or days before the District Court case then this Court has jurisdiction. So I'm not sure why the plaintiff took that position.

Anyway, the Brandts haven't taken a similar position here, so I think that while there's certainly cases on both sides I think Young had the best of it with respect to pending, plus to interpret pending as it's used in § 1500 to include the time to appeal would require adding terms to the statute.

Section 1500 would have to be amended to provide as pending in any other Court or for which the time to appeal has not expired. I mean, the statute doesn't say that, and I don't think the framers of this or the Congress intended pending to mean during the time the appeals were ripe. Pending has got to be interpreted at the time Congress passed § 1500.

And also the order of filing rule, which I mentioned earlier, also kind of supports this interpretation because, as I said, if we file here a day early before we file in District Court, jurisdiction is good here. Here the government's

conceded that we filed our taking claim in this Court one day before we filed our appeal of the District Court's final judgment.

And if under the order of filing rule pending does not include an identical case that is filed minutes after a case is filed here, then pending should not include a notice of appeal that is filed one day after a complaint is filed in this Court, especially when the complaint filed in this Court contains a distinct and separate claim as we have here. Therefore, any claim --

THE COURT: There's an assertion there's a distinct and separate claim, but aren't we talking about the same piece of property?

MR. LECHNER: It is the same piece of property.

THE COURT: And who has rights in it.

MR. LECHNER: And who has rights in it. And this segues into the issue of operative facts of course.

THE COURT: It is the issue of operative facts.

MR. LECHNER: And operative fact means a fact that constitutes the transaction or event on which a claim is based, and that's from *Black's Law*

Dictionary.

Here, and I'm only focusing on the Brandts' quiet title counterclaim because I think that the takings counterclaim is irrelevant for this purpose, but the Brandts' quiet title counterclaim and their takings claim are separate and distinct because the operative facts are different.

The operative facts for the quiet title counterclaim -- the operative fact, and that is the event on which the claim is based for the quiet title counterclaim -- occurred on January 15, 2004, and that is when the railroad consummated abandonment of its railroad easement. On that date, the Brandts' property became unburdened by the railroad easement, so for the Quiet Title Act that is the operative fact, what occurred on that date.

In contrast, the operative fact for the takings claim occurred almost five years later on March 2, 2009, when the District Court first issued a judicial decree of abandonment, which was necessary for the operation of 43 U.S.C. 912 and 16 U.S.C. 1248(c), the Rails to Trails provision.

On that date, the District Court also quieted title in the railroad easement in favor of the United States, and then he went even further and he

held that the scope of the railroad easement included the right to construct and operate a recreational trail. So those are the operative facts or that March 2 order was the operative facts with respect to the takings claim because that is when the taking is effective.

Granted, for a taking claim a necessary component is ownership of property, but that's not the operative fact for the taking because I think the caselaw is well established that the operative fact for a takings claim is when did the taking occur. What were the actions, the government actions, that effectuated the taking? And we think those are the actions that occurred on March 2.

So since the operative facts occurred five years apart between the two claims, the operative facts are different for this case and therefore Tohono and § 1500 do not divest this Court of jurisdiction. Granted, we allege similar background facts regarding the history of the railroad easement, but background facts are not operative facts.

This interpretation of the term operative facts is supported by again Judge Smith in Fire-Trol Holdings, LLC v. United States, 65 Fed. Cl. 32. There plaintiff filed a District Court case challenging new

procurement regulations. The District Court dismissed that case for lack of jurisdiction. The plaintiff appealed to the Ninth Circuit.

The plaintiff then filed a prebid complaint in the Court of Federal Claims, and Judge Smith held that the two cases did not have the same operative facts because the rulemaking, which was the subject of the District Court case, occurred before the solicitation for bids that was the subject of the Court of Federal Claims case, and therefore they didn't have the same operative facts.

Also, I suggest that Your Honor's decision in Ak-Chin Indian Community v. United States, 80 Fed. Cl. 305, supports my interpretation of the term operative facts. Although in that case Your Honor found that the claims were based on the same operative facts, Your Honor noted that the operative facts are not the same if the claims are based upon different conduct or events.

So this brings me back to what I'm referring to as the operative facts, the January 15, 2004, abandonment for the quiet title and the March 2, 2009, order by the Wyoming District Court Judge for the takings claim. Moreover, the Federal Circuit's recent decision in Trusted Integration, Inc. v. United

States, 659 F.3d 1159, supports this theory.

There the Federal Circuit held that the claim for breach of a license agreement that had been filed in this Court was not barred by § 1500 because it was based upon an agreement separate from the related agreements that were at issue in the pending District Court case. So even though they're in related agreements, the District Court had these agreements and this Court had the license agreement, and the Federal Circuit said that those were not based on the same operative facts.

And more recently, Judge Miller in Stockton East Water District v. United States on October 31, 2011, 2011 Westlaw 5154463, ruled that the operative facts in the Court of Federal Claims case were not substantially the same as the operative facts in the pending District Court case because the Court of Federal Claims case raised breach of contract claims that arose after the District Court case was filed.

And that's much similar to what we have here with our takings claims that we filed in this Court because the event of the taking occurred after the counterclaim had been filed in the District Court and frankly occurred on the date the District Court quieted title in favor of the United States.

We anticipate that the government may rely on Central Pines Land Company v. United States, 99 Fed. Cl. 394. They haven't mentioned it, but I'm sure they'll find it. There the plaintiff chose to file a Quiet Title Act case in District Court and shortly thereafter a takings case in this Court. Of course the plaintiff there filed the cases, so therefore he failed to elect what Court to litigate in as Tohono has interpreted § 1500 to require plaintiffs to elect.

There the plaintiff didn't elect, and in that case, even though Judge Firestone found that the cases were based on the same operative facts, the taking had occurred. The alleged taking was based on events that occurred before the plaintiff filed its Quiet Title Act case.

THE COURT: Has that been appealed by the way?

MR. LECHNER: Central Pines?

THE COURT: Yes. Yes. If you know.

MR. LECHNER: I didn't see it had been appealed, but I didn't check the docket.

THE COURT: The Judge thought that was a harsh result.

MR. LECHNER: It was very harsh because the Judge had already awarded just compensation, but there

again the taking had occurred at the time that the quiet title case had been filed, and that is not the case here.

In that decision, Judge Firestone also ruled that two cases must stem from the same events. Here the operative facts, like I talked about, do not stem from the same events because the quiet title counterclaim stems from the 2004 abandonment by the railroad and the takings claim stems from the 2009 judicial decree of abandonment and order quieting title in favor of the United States. Therefore, because the claims are not based on the same operative facts, the government's motion should be denied.

And finally, the purpose of 1500 would not be violated by denying the United States' motion. The purpose of § 1500 is to save the government from redundant and duplicative litigation, in other words, to make the plaintiff elect where to litigate. The predecessor statute to § 1500 was passed to prevent the Kaufman claimants from suing for statutory damages here and suing for tort-based damages in District Court.

Here the Brandts' quiet title counterclaim and taking claims are neither redundant nor duplicative. Instead, they are essentially mutually

exclusive. If the Tenth Circuit quiets title in favor of the Brandts based on their counterclaim, the takings claim here will disappear.

Also here we have the Brandts here essentially because the Brandts were dragged into District Court. The United States elected where to litigate, not the Plaintiff. Granted, the Brandts filed their quiet title counterclaim, but to hold that the quiet title counterclaim triggers 1500 would be fundamentally unfair because if we hadn't raised it we wouldn't have title, like I mentioned earlier. We'd have to file a new lawsuit seeking quiet title ourselves.

And once we did file that case, then we know what the United States would do, and they would move to dismiss saying that the quiet title counterclaim was a compulsory counterclaim and therefore under res judicata grounds they would move to dismiss that. Thus, under that theory, heads the United States wins, tails the Brandts lose.

Also, to adopt the government's rationale here will allow the United States to preempt takings claims by simply filing quiet title actions in District Court because under the United States' rationale, the defendant in such a suit should not

file a counterclaim because the counterclaim could bar the filing of a takings claim in this Court, yet if the United States' Quiet Title Act case lasts more than six years, the statute of limitations would have run, and I don't know how we would prevent that.

Neither the framers nor Congress could have intended such an absurd result. Therefore, I respectfully request that the Court deny the United States' motion.

THE COURT: I can imagine the United States wanting to responde to some of that, but before you sit down, let me just make sure that I understand your view about at least one of the authorities that could be viewed as affecting the interpretation of pending. The 2002 Carey v. Saffold, the U.S. Supreme Court case, has that crossed your radar? This is a state post conviction that then went up on review.

MR. LECHNER: Well, they were interpreting pending in a completely different context.

THE COURT: All true.

MR. LECHNER: And it had to do with habeas corpus proceedings, which are completely different. I just don't think that the plain meaning of pending can mean including the time for appeal. I mean, I recognize that that's what --

THE COURT: That's kind of what the Supreme Court said. Kind of, kind of.

MR. LECHNER: Well, yes.

THE COURT: There's no accounting for taste. I understand that. It's a different context.

MR. LECHNER: But you have to look at what the drafters of § 1500 and even the drafters of § 1500's predecessor statute were getting at, and I don't think when they passed the original § 1500 to bar the Kaufman claimants from seeking duplicative relief, statutory damages and tort-based damages -- that was the whole purpose of § 1500's predecessor.

I don't think Congress then was thinking about oh, the word pending includes the time for filing appeals. I just think that's a little stretched there and there's no evidence that they were thinking that that was how they interpreted pending. So I recognize that that's what Jachetta cited --

THE COURT: That's what they relied on.

MR. LECHNER: Yes, that's what they relied on.

THE COURT: And it's hard for the Court to understand depending on what one determines the modern trend to be here. Pending seems to be a word in common enough usage like file that you'd like to know

what it meant. You know, we ought to work toward that in some fashion.

MR. LECHNER: Well, I mean, I go back to the order of filing rule. With the order of filing rule, which is still good law, then our interpretation of pending should carry the day.

THE COURT: Under the order of filing rule.

MR. LECHNER: Well, our interpretation is no more unusual than the order of filing rule. If you file it here minutes before you file it in District Court, you're good to go.

THE COURT: It's not a perfect world.

MR. LECHNER: If you have no more questions?

THE COURT: At the moment. Thanks.

MR. LECHNER: Thank you.

THE COURT: Thank you. Counsel for the United States, anything in response?

MR. DOAN: Thank you, Your Honor.

THE COURT: Or a reply?

MR. DOAN: A few brief comments. Again, Joshua Doan for the United States for purposes of the record.

The main point I'd like to just reiterate is that Plaintiff's counsel was talking about different events, abandonment in the one case and the judgment

of the District of Wyoming in the other, as being an irrelevant event for determining whether the claims arise from the same or substantially the same operative facts.

The threshold issue in any takings claim is who owns the property allegedly taken on the date of the alleged taking. That has to be litigated. And in fact, it was litigated, and § 1500 is in many respects a weaker test than the test we would have to satisfy under our initial motion to dismiss on issue preclusion grounds.

For the issue preclusion motion to dismiss we actually had to show that there was a final judgment in favor of the United States on the issue of ownership. Here we don't have to show that there's a final judgment going our way. We merely have to show that the same issues are being litigated in both cases, and they would have to be litigated here.

If there had been no litigation in the District of Wyoming, the issue of ownership on the date of the alleged taking would need to be litigated here, so you can't have the litigation in the two cases and not have the cases be based on substantially the same operative facts, particularly where in both cases the Brandts are pointing to the same land patent

and the language that was used in that patent and not used in that patent as their evidence of whether or not they own the reversionary interest in the 1875 Act right-of-way.

Mr. Lechner was talking a bit about the order of filing rule. I just wanted to say for purposes of the record we did not brief the Tecon Engineers issue. We had one footnote about it in our opening brief. We did not understand that the Tecon issue was in play here, and we submit that it should not be in play here.

I mean, there's no question that the District Court case was filed years before the CFC case was filed in this case, so there is no issue under Tecon. If the Court is inclined to think that there might be, we would just ask for the opportunity to submit further briefing as to whether or not Tecon remains good law in light of the Supreme Court's decision in Tohono O'odham.

I know that the United States has briefed that in other cases before Your Honor, but Plaintiffs, the Brandts, have not had the opportunity to respond to that, so if it is an issue, we would like the opportunity to brief it if Your Honor believes that that would be useful.

As to the issue whether there's been no stipulation as to the date on which the taking allegedly occurred, the United States is the Defendant here. I mean, we have to go by what the Plaintiffs allege, and as the Plaintiffs allege in their complaint the claim did not accrue until the District Court's judgment was issued in 2009.

Because they allege a 2009, a March 2009 accrual, there is no § 2501 issue here. We're still well within the six-year statute of limitations. The last time I checked there had been no decision by the Tenth Circuit, so I don't have anything else to tell Your Honor on that. The case was argued over 18 months ago as I understand, so I don't know when it will come out, but it has been a while.

The one point about whether the lack of jurisdiction over a claim arising from the same or substantially the same operative facts in the other Court has any implication in the § 1500 analysis here, I think the answer to that question is no. Regardless of whether the other Court has jurisdiction, if jurisdiction has been asserted, subject matter jurisdiction has been asserted at the time that the case is brought here, then § 1500 applies.

And the two cases that I could cite for that

proposition I believe would be I believe in the Supreme Court's decision in Keene v. United States at 508 U.S. 200, and I think the pin cite would be 204 to 205, there was a dismissal of the case in the Southern District of New York I believe five days after the case was filed in the Court of Federal Claims.

The quote I'm looking at right now says, "Only five days before the Southern District's dismissal of that omnibus action, Keene returned to the Court of Federal Claims with the second of the complaints at issue here," and also on page 204 the Court refers to a suit that was a summary dismissal on the basis of sovereign immunity.

So I think that's one of the cases that answers the question. Another is a case which I'll acknowledge we did not cite in our brief, but it's a decision by the Federal Circuit in Trusted Integration, Inc. v. United States. There's only a Westlaw cite at least in the copy I'm holding right now. It's 2011 Westlaw 4888787. It was decided on October 14, 2011.

THE COURT: We have it, and I understand the Plaintiffs do as well.

MR. DOAN: Okay. And I believe in that case the Court in a footnote at the end, Footnote 2, says,

"We hold that the fact that the District Court dismissed some of the counts of Trusted Integration's District Court complaint has no effect on our analysis of each of the counts in the CFC complaint. We apply § 1500's jurisdictional bar by looking at the facts existing when Trusted Integration filed each of its complaints following the longstanding principle of jurisdiction of the Court depends upon the state of things at the time of the action brought."

And if you look at page Star 3 in the decision, the dismissals in the District Court were based on lack of subject matter jurisdiction. So I believe that those cases do shed some light on the question whether the other Court's lack of jurisdiction has any implications for § 1500 purposes. Of course there's nothing in § 1500 itself that says pending in a Court of competent jurisdiction. It just says pending. So I think that's the most natural reading of the statute.

So I think those are the only points that I wanted to make in reply unless Your Honor has further questions. I'd be happy to answer them.

THE COURT: Possibly after I hear again from Plaintiff.

MR. DOAN: Okay. Thank you, Your Honor.

THE COURT: Thank you.

Would you like to comment more on anything, Mr. Lechner? Thank you. You did mention I think the Trusted Integration in your presentation.

MR. LECHNER: Well, yes. I'm familiar with that case, and it looks to me like that footnote talks about the Court of Federal Claims acquiring jurisdiction retroactively.

And I still think that the Vero Technical case that I mentioned, which the government relies on with respect to the issue of pending, deals more directly with the issue of claims upon which the Court, the District Court doesn't have jurisdiction. If it pleases Your Honor, I'd be glad to brief this issue more since the parties really didn't brief it in their earlier papers if that would be beneficial.

THE COURT: Well, why don't we wrestle with it and let you know?

MR. LECHNER: Okay. Okay. Any more questions?

THE COURT: No. Thank you.

MR. LECHNER: Thank you.

THE COURT: Nothing further from the United States?

MR. DOAN: Nothing further from me, Your

Honor, unless Your Honor has some further questions.

THE COURT: No. We'll wrestle with the contentions of oral argument and appreciate the help that you've provided to the Court today and appreciate the offer for more if necessary.

MR. LECHNER: Thank you.

MR. DOAN: Thank you, Your Honor.

THE COURT: Thank you.

THE CLERK: All rise.

THE COURT: We're adjourned.

(Whereupon, at 3:45 p.m., the hearing in the above-entitled matter was concluded.)

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CERTIFICATE

DOCKET NO.: 09-265L
CASE TITLE: Brandt et al v. U.S. (Live)
HEARING DATE: Washington DC, 11/22/11

I certify that the foregoing is a true and correct transcript made to the best of our ability from a copy of the official electronic digital recording provided by the United States Court of Federal Claims in the above-entitled matter.

Date 12/27/11

Karen Levandowski

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